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Supreme Court, U.S.
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In The
Supreme Court of The United States
October Term, 1997

Guardianship and Conservatorship
of the Person and Estate of
Alicia A. Waters
a Severely Mentally and physically Disabled Person

Charles E. Waters and Florence E. Waters,
Petitioners,

v.

PIERRE B. FRAZIER,
Respondent,

Petition For a Writ of Certiorari to The United States Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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Conservators of the Person of
Alicia A. Waters
Petitioners in Pro-Se

45 pp

QUESTIONS PRESENTED FOR REVIEW

1. To unify divergent holdings of the Courts of Appeal Resulting from the Fourth Appellate District's opinion affirming a probate court's decision not to accord res judicata effect to interim orders setteling accountings of Guardingship/Conservatorship Estates under Probate Code section 2103 despite the absence of any findings that the orders were obtained by fraud, conspircy or misrepresentation of any material fact.

2. To settle the question of whether the substantive due process rights of the families of the state of California are threatened by a State policy mandating the application of the doctrine of implied findings to support the affirmance of probate court orders denying petitions by parents to be appointed conservators of the Estates of their disabled children, thereby authorizing government intrusions into fundamental privacy interest of family autonomy while obviating its burden of proving that its orders are both necessary and narrowly tailored to achieve a compelling state interest.

PARTIES TO THE PROCEEDINGS

This case arises from a judgement of the Fourth Appellate District, Division One of San Diego California which affirmed the judgement of the Superior Court of the County of San Diego. Respondents, as identified in the caption, are not the only parties to the proceeding.

A list of parties not listed in the caption to the proceeding in the court whose judgement is the subject of this petition is as follows:

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OPINIONS AND ORDERS BELOW

The opinion of the Fourth Appellate District, Division One, dated May 27, 1997, is unreported and is set forth in Appendix A pages 1-38 and is unpublished. The denial of review by the California Supreme Court dated August 13, 1997, is set forth in Appendix C page 1.

STATEMENT OF JURISDICTION

The opinion of the Fourth Appellate District, Division one was entered on May 27, 1997. The denial of review by the California Supreme Court was entered on August 13, 1997. The jurisdiction of this court rest on 28 U.S.C.A. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution states:

No person shall . . . be *deprived of* life, liberty, or *property, without due process of law.*

The Fourteenth Amendment of the United States Constitution states:

It is forbids the making or enforcement by any state of any law abridging the privileges and immunities of citizens of the United States; and secures all "persons" against any state action which results in either *deprivation of* life, liberty, "or *property" without due process of law.*

STATEMENT OF THE CASE

Charles E. Waters and his wife, Florence Elaine Waters [hereafter referred to as the Waters] petitioned the Superior Court of the State of California, for the County of San Diego to be appointed as conservators of the estate of their severely permanently brain damaged daughter, Alicia A. Waters [hereafter referred to as Alicia] upon the termination of the guardianship when Alicia attained majority. The petition was denied based on the trial court's unsupported findings that the Waters mismanaged the assets of the guardianship estate. Acknowledging that the Waters had provided excellent and loving care to their daughter as guardians of both Alicia's person and estate during the ten year guardianship, the probate court appointed the Waters as conservators of Alicia's person, but appointed a third person, Claudia Powell, a stranger, as conservator of Alicia's estate.

In lieu of imposing a statutory surcharge, and as alternative remedy for the alleged mismanagement of estate assets, the trial court compelled the Waters to execute a non-interest bearing promissory note in the amount of $150,000.00 to be secured by a second deed of trust on their residence.

Pierre B. Frazier, the court appointed temporary conservator of Alicia's estate, along with separate counsel for the Waters and Alicia, attended an unreported conference held in Judge Thomas R. Mitchell's chambers on August 9, 1995 to resolve problems with the Fifth Accounting. Frazier recommended that $55,391.00 in disbursements claimed by the Waters during the Fifth Accounting period be disallowed. Judith Abeles, the court appointed attorney for Alicia, recommended that $161,191.75 in disbursements claimed by the Waters during the Fifth Accounting period be disallowed.

The trial court arrived at the figure of $150,000.00 by compromising between the two recommended amounts and thereby necessarily disallowed $67,422.63 in disbursements claimed by the Waters during the Fifth Accounting period

without according the Waters the benefit of an evidentiary hearing.

The trial court's tentative ruling of August 9, 1995, ripened into the September 20, 1995 final order. 1.) denying the Waters' petition to be appointed as conservators of their daughters estate; 2.) appointing Claudia Powell, a stranger, as conservator of Alicia's estate, and 3.) compelling the Waters to execute a non-interest bearing promissory note in the amount of $150,000.00 to be secured by a second deed of trust on thir residence. The Waters appealed the order.

Concluding that the Waters were not denied procedural due process and that all four interim orders approving the first four accountings were not res judicata, the Fourth Appellate District affirmed the trial court's order. The court of Appeal's opinion filed on May 27, 1997, is attached hereto as Appendix A, pages 1a-16a. The California Supreme Courts denial of the Petition for Review filed on August 13, 1997, is attached hereto as Appendix C, page 17a, and is the subject of this Petition for Writ of Certiorari.

RES JUDICATA EFFECT OF PROBATE CODE SECTION 2103

Simply stated, the public policy underlying the doctrines of res judicata [claim preclusion] and collateral estoppel [issue preclusion] is to promote judicial economy by assuring the absolute finality of judgements and final orders and thereby prevent relitigation of the same cause of action between the same parties or their privies. In this way the doctrines guard against inconsistent judgements and prevent a losing party [or privy] from harassing the prevailing party by continuing suits on the same matter.

A final order made under *Probate Code* section 2103 settling and allowing a guardian/conservator's account releases the guardian/conservator from all claims of the ward/conservatee and of any persons affected thereby based on any act or omission directly authorized, approved, or

confirmed in the order, so long as that order is not obtained by fraud, conspiracy or by misrepresentation as to any material fact. [*In re Harvey's Estate* (1970) 3 Cal. 3d 646, 91 Cal. Rptr. 510, 477 P.2d 742].

The Court of Appeal affirmed the trial court's order based in part upon the trial court's findings that the Waters expended $71,638.50 of the estate assets previously approved and allowed by the probate court to improve the family residence for the specific benefit of their daughter. On the ground that the prior interim orders which approved and allowed these expenditures did not direct how Alicia's interest in such real property was to be reflected, the Court of Appeal concluded that *even without a showing of "fraud, misrepresentation or omission of material fact,"* the Waters were not entitled to assert a res judicata bar in their fifth accounting. [Op. 26:6-27.7].

The doctrine of res judicata has two aspects: 1.) Merger and bar; and 2.) collateral estoppel. The order is accorded a res judicata effect, i.e., claim preclusion, as to matters "necessarily adjudicated" and a collateral estoppel effect, i.e., issue preclusion, as to matters "actually litigated." There is a difference between the two concepts and when they are applied. Not all matters "necessarily adjudicated" for purposes of res judicata are "actually litigated" for the purposes of collateral estoppel.

Res judicata will apply only if the first action ended in a final judgement or final order *on the merits.* A judgement or final order rendered after the parties have been afforded *an opportunity to litigate the merits* is a judgement on the merits. The probate court is charged with the duty of scrutinizing the accounts and determining *all* issues raised by a petition for settlement. This duty requires the court not only to approve each account's mathematical accuracy, but also to decide *all underlying issues,* including whether the estate has been mismanaged. [*McLellan vs. McLellan* (1941) 17 Cal. 2d 552, 110 P.2d 1034] The purpose of periodic accountings is to allow the court to examine the record of the estate's

administration and to afford the court the opportunity to *pass on* the propriety and reasonableness of the managemant, [i.e., receipts, claims and disbursements, ect.] of the estate's assets. An order setteling and allowing an account [whether interim or final] operates in rem. After it becomes final, the order is *conclusive* res judicata against all persons interested in the estate *as to all matters embraced by the order.*

The Court of Appeal cites the probate Court's failure to pass on the issue of Alicia's interest in the real property as the basis for denying the res judicata effect of such interim orders. The issue is whether the matter in which title to the real property was vested was a matter that was embraced by the previous interim orders.

Generally, under *Code of Civil Procedures* section 1908, the effect of a final order in a special proceeding before a state court having jurisdiction to pronounce the order against a specific thing is conclusive upon its title. When the probate court approved and allowed the previous four accountings, it had before it all of the information concerning the ownership of the real property and estate assets used to improve the real property. By approving and allowing such expenditures, the probate court necessarily adjudicated the propriety and reasonableness of the Waters' management of the estate assets and, as a matter embraced by such orders, the manner in which title to the real property was held was passed upon, if not actually litigated. In the absence of fraud, conspiracy, or misrepresentation of material fact, these circumstances are sufficient to trigger the res judicata bar of *Probate Code* section 2103.

The trial court's order compelling the Waters to execute a $150,000.00 promissory note which is secured by a deed of trust on their residence, and payable upon demand to the conservator of the estate. To the extent that the Court of Appeal's affirmance of this order is based on the conclusion that the Waters are not entitled to assert a res judicate bar as to probate court orders approving such expenditures of estate assets, United States Supreme Court of Appeals is required

to unify the resulting divergence in the holdings of the appellate courts which have until now accorded a res judicata effect to such interim orders. [*In re Harvey's Estate* (1970) 3 Cal. 3d 646, 91 Cal. Rptr. 510, 477 P.2d 742].

DOCTRINE OF IMPLIED FINDINGS VIOLATES SUBSTANTATIVE DUE PROCESS

The United States Supreme Court recognized the right of parents to direct the upbringing of children under their control as a fundamental privacy interest in maintaining family autonomy. [*Pierce v. Society of Sisters*, U.S. 510 (1925)] As such, any governmental impingement of such an interest will be subject to strict constitutional scrutiny. Under the strict scrutiny test, the state policy compelling the Court of Appeal to apply the doctrine of implied findings to affirm a court order which impinges a fundamental interest must be shown by the government to be necessary and narrowly-tailored to achieve a compelling governmental interest.

The Waters recognize that the government's interest in the identification and correction of the mismanagement of estate assets by fiduciaries is compelling. Judicial action by state courts has been held to be state action sufficient to invoke constitutional scrutiny. [*Shelley v. Kraemer*, 334 U.S. 1 (1948) Thus, the action by the Court of Appeal in applying the doctrine of implied findings in this case and the denial of the California Supreme Court to review the case constitutes federal action.

Under the strict scrutiny test, the burden is on the government to prove that the means employed to achieve its objective are necessary and narrowly-tailored. In the absence of an evidentiary hearing, the necessity of the trial court's order could not be ascertained. Notwithstanding the Court of Appeal's opinion to the contrary [Op. 30:6-9], the burden was on the government to provide the Waters with an evidentiary hearing, even if required to do so sua sponte.

Further, the application of the doctrine of implied findings [i.e., the *presumption* that the trial court performed correctly in the face of a silent record] should not be applied in a case subject to strict scrutiny because such a presumption could in no way ensure that the probate court has methodically gone through each specific item and objection to that item in an account before it on a guardianship or conservatorship estate before allowing or disallowing a particular item, and thereby meet the narrowly-tailored requirement of the strict scrutiny test applicable here.

Consequently, the Court of Appeal's application of the doctrine of implied findings to affirm an order which impinges a fundamental privacy interest will not meet the narrowly-tailored element of strict scrutiny, and thus raises an important question of law necessitating Supreme Court of the United States to determine whether the applicability of the doctrine of implied findings to such a case threatens the substantive due process rights of the families in the State of California in general, and violates the substantive due process rights of the Waters in particular.

REASONS FOR GRANTING THE PETITION

To unify divergent holdings of the Courts of Appeal as to according res judicata effect to *Probate Code section 2103* interm orders, coupled with the threat to the substantive due process rights of California Families imposed by the application of the doctrine of implied findings to affirm court orders which impinge fundamental privacy interest in family autonomy while obviating the government's burden of proving that such orders are necessary and narrowly tailored to achieve a compelling state interest necessitate United States Supreme Court review to secure uniformity of decision and to settle an important question of law.

CONCLUSION

The petition for Writ of Certiorari should be granted, to encourage families to care for disabled family members so as to reduce the financial burden on state funded facilities providing instititionalized care, it is respectfully requested that the United States Supreme Court grant this petition for Writ of Certiorari in order to secure uniformity of decision by determining on the merits whether the first four accountings that were previously approved by judges in the past of expenditures specifically for their daughters benefit are to be accorded a res judicata effect, and whether the Waters are entitled to an evidentiary hearing to determine the merits of the disallowance of each disputed disbursement of the Fifth Accounting before being subjected to a court order which impermissibly impinges their privacy interest in family autonomy in order to protect the substantive due process rights secured to them by the Fourteenth Amendment of the United States Constitution.

Respectfully submitted,

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January 29, 1997